(3)

Supreme Court, U.S.
FILED
NOV 28 1997
CLERK

No. 97-552

# In the Supreme Court of the United States

OCTOBER TERM, 1997

DOMINO'S PIZZA, INC., PETITIONER

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND DAVID PAPA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

C. GREGORY STEWART
*General Counsel*

J. RAY TERRY, JR.
*Deputy General Counsel*

VINCENT J. BLACKWOOD
*Acting Associate General Counsel*

LORRAINE C. DAVIS
*Assistant General Counsel*

JENNIFER S. GOLDSTEIN
*Attorney*
*Equal Employment Opportunity Commission*
*Washington, D.C. 20507*

1788

## QUESTIONS PRESENTED

1. Whether the district court applied the correct legal standard in determining that petitioner was liable for the hostile work environment created by one of its corporate area supervisors.

2. Whether the district court abused its discretion in ordering petitioner to refrain from further harassment and retaliation, to post notices of its existing harassment and retaliation policies, and to train its managers in those policies.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 13 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970) | 9 |
| *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) | 11 |
| *Bouton* v. *BMW of N. Am., Inc.*, 29 F.3d 103 (3d Cir. 1994) | 6-7 |
| *Davis* v. *City of Sioux City*, 115 F.3d 1365 (8th Cir. 1997) | 6 |
| *Faragher* v. *City of Boca Raton*, cert. granted, No. 97-282 (Nov. 14,1997) | 5, 6 |
| *Farley* v. *American Cast Iron Pipe Co.*, 115 F.3d 1548 (11th Cir. 1997) | 8 |
| *General Tel. Co.* v. *EEOC*, 446 U.S. 318 (1980) | 12 |
| *Henson* v. *City of Dundee*, 682 F.2d 897 (11th Cir. 1982) | 8 |
| *Jansen* v. *Packaging Corporation of America*, 123 F.3d 490 (7th Cir. 1997), petition for cert. pending, No. 97-569 | 6 |
| *Karibian* v. *Columbia Univ.*, 14 F.3d 773 (2d Cir.), cert. denied, 512 U.S. 1213 (1994) | 7 |
| *Kauffman* v. *Allied Signal, Inc.*, 970 F.2d 178 (6th Cir.), cert. denied, 506 U.S. 1041 (1992) | 7 |
| *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) | 10 |
| *Louisiana* v. *United States*, 380 U.S. 145 (1965) | 11 |

Cases—Continued: Page

*Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986) ..... 5
*Nichols* v. *Frank*, 42 F.3d 503 (9th Cir. 1994) ..... 6
*Sauers* v. *Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993) ..... 7
*Steele* v. *Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989) ..... 7, 10
*United States* v. *Martinez*, 96 F.3d 473 (11th Cir. 1996), cert. denied, 117 S. Ct. 998 (1997) ..... 9

Statute and regulations:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... 3
29 C.F.R. 1604.11(a)(2) ..... 6

# In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-552

DOMINO'S PIZZA, INC., PETITIONER

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND DAVID PAPA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 3a-17a) is reported at 909 F. Supp. 1529.

### JURISDICTION

The judgment of the court of appeals was entered on April 17, 1997. A petition for rehearing was denied on July 3, 1997. Pet. App. 18a-20a. The petition for a writ of certiorari was filed on September 26, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner Domino's Pizza employed respondent David Papa as the manager of one of its pizza stores. Pet. App. 4a. Beth Carrier, a corporate area supervisor, was Papa's supervisor. *Ibid.* After promoting Papa to store manager, Carrier repeatedly made unwelcome sexual advances to him. *Id.* at 4a-5a. When Carrier would visit Papa's store, she would rub his neck and back. *Ibid.* While standing beside Papa, Carrier would put her hand around Papa's waist. *Ibid.* At one business meeting, Carrier told Papa that he had a "nice ass" and that he should not bend over because it "turned her on." *Ibid.* When they were distributing coupons to local residents, Carrier again told Papa that he had a "nice ass." *Ibid.* At various times, Carrier told Papa that she was interested in starting a relationship with him, that she loved him and cared for him, and that if he started a relationship with her, he could become a supervisor. *Id.* at 4a-5a. On one visit to the store, Carrier moved close to Papa, put her arm around his back, and "reached down with her hand and she grabbed [his] behind and squeezed it." *Id.* at 5a. On another visit to the store, Carrier told Papa that her bra had snapped off and then asked whether that turned him on. *Ibid.*

Carrier's sexual advances embarrassed Papa and made him feel uncomfortable. Pet. App. 8a. Papa was so uncomfortable that he instructed one of the employees at his store to be present whenever Carrier visited. *Ibid.* Papa also repeatedly made it clear to Carrier that her sexual advances were unwelcome, and on one occasion explicitly instructed her not to touch him. *Id.* at 8a-9a. Carrier nonetheless persisted in her conduct. *Id.* at 8a. Ultimately, in

response to one of Carrier's statements that she loved him and wanted to live with him, Papa ordered her from his office and threatened to report her conduct to her supervisor. *Id.* at 5a. Upon leaving the store, Carrier threatened to "get" Papa. *Ibid.* Approximately six days later, Carrier came to the store with her superior and fired Papa. *Ibid.*

2. The Equal Employment Opportunity Commission (EEOC) filed suit against petitioner, alleging that petitioner had subjected Papa to discrimination on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 3a. Specifically, EEOC alleged that Papa had been subjected to a sexually hostile work environment, that he had been fired for rejecting Carrier's advances (quid pro quo harassment), and that he had been subjected to retaliation for threatening to report the harassment. *Ibid.* Papa intervened in the action. *Ibid.*

After a trial, the district court found in favor of the EEOC and Papa. Pet. App. 3a-17a. The court first found that Carrier had subjected Papa to a hostile working environment. It found that Carrier's repeated advances were unwelcome, and that her harassment of Papa was sufficiently severe and pervasive to alter the conditions of his employment. *Id.* at 8a-9a. The court then concluded that petitioner was liable for the hostile working environment created by Carrier. The court noted that, under circuit precedent, an employer can be liable for a hostile working environment created by a supervisor when (1) the employer knew or should have known about the harassment, or (2) the supervisor used delegated authority to effectuate the harassment. *Id.* at 9a-10a. The court found that petitioner did not have actual or

constructive knowledge of the hostile atmosphere created by Carrier. It concluded that petitioner was liable for Carrier's conduct in creating a hostile work environment, however, because Carrier had used authority delegated to her by petitioner when she fired Papa. *Id.* at 10a.

The court next found that Papa had been subjected to quid pro quo harassment. Pet. App. 10a-11a. The court held that quid pro quo harassment involves proof that the rejection of harassment is the "cause of a tangible job detriment." *Id.* at 11a. The court found that such a showing had been made in this case, since Papa's rejection of Carrier's harassment resulted in his termination. *Ibid.* The court concluded that petitioner was liable for Papa's quid pro quo harassment because petitioner had invested authority in Carrier to terminate Papa. *Id.* at 11a n.1.

Finally, the court found that Papa suffered unlawful retaliation for voicing his opposition to Carrier's sexual advances. Pet. App. 12a. The court found that the short period of time between Carrier's comment that she would "get" Papa and Carrier's firing of Papa "clearly proves a causal connection between the protected activity and the firing." *Ibid.*

The court awarded Papa $237,257.52 in back pay. Pet. App. 13a-15a. The court also permanently enjoined petitioner from sexually harassing or retaliating against employees, directed petitioner to post a written sexual harassment and retaliation policy in each of its stores for two years, and directed petitioner to conduct training of its managers concerning its sexual harassment and retaliations policies once a year for the next two years. *Id.* at 16a-17a.

3. The court of appeals affirmed without opinion. Pet. App. 1a-2a. The court of appeals also denied the

petition for rehearing and suggestion of rehearing en banc. *Id.* at 20a.

## ARGUMENT

1. Petitioner contends (Pet. 6-15) that this Court should grant certiorari to resolve a conflict in the circuits concerning the standard for determining when an employer is liable for a hostile working environment created by one of its supervisors. This Court recently granted certiorari to resolve that issue in *Faragher* v. *City of Boca Raton*, cert. granted No. 97-282 (Nov. 14, 1997).

This case, however, need not be held pending the decision in *Faragher*. The district court in this case found petitioner liable not only for subjecting Papa to a hostile working environment, but also for quid pro quo harassment and for unlawful retaliation. Although the decision in *Faragher* could affect petitioner's liability for the creation of a hostile working environment, the findings of quid pro quo harassment and retaliation provide independent grounds for the judgment below that should not be affected by *Faragher*. Petitioner also waived its claim that the district court applied an incorrect legal standard in finding it liable for the creation of a hostile working environment by failing to assert it in a timely manner below. For those reasons, the petition in this case should be denied, without awaiting the decision in *Faragher*.

a. In *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 72 (1986), the Court held that courts should be guided by agency principles in deciding when an employer is liable for harassment committed by one of its supervisors. Since *Meritor Savings*, courts of appeals have divided on the circumstances in which

a supervisor can be viewed as an agent of the employer in creating a hostile work environment. Some courts have limited recovery to situations in which the employer knew or should have known about the harassment, while other courts have also permitted recovery when supervisors use their supervisory authority to effect the harassment. See Pet. 11-14 (discussing the cases). This Court granted certiorari in *Faragher* to resolve that conflict. See 97-282 Pet. at i ("Is an employer, pursuant to common-law principles of agency, responsible for hostile-environment sexual harassment committed by supervisory employees who use their supervisory status to effect the harassment?").

The petition in *Faragher*, however, does not raise any question concerning the circumstances in which an employer is liable when a supervisor engages in quid pro quo harassment, *i.e.*, when a supervisor uses an employee's submission to or rejection of unwelcome sexual conduct as the basis for employment decisions affecting the employee, such as promotions, pay raises, or terminations. See 29 C.F.R. 1604.11(a)(2) (defining quid pro quo harassment). Nor is there any division in the circuits on that distinct issue. Because supervisors are able to engage in quid pro quo harassment only by virtue of authority conferred by the employer to grant job benefits or detriments, the courts of appeals have uniformly concluded that an employer is vicariously liable for a supervisor's quid pro quo harassment, without respect to the employer's actual or constructive knowledge of the harassment. *Jansen* v. *Packaging Corporation of America*, 123 F.3d 490, 495 (7th Cir. 1997), petition for cert. pending, No. 97-569; *Davis* v. *City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols* v. *Frank*,

42 F.3d 503, 513-514 (9th Cir. 1994); *Bouton* v. *BMW of N. Am., Inc.*, 29 F.3d 103, 106-107 (3d Cir. 1994); *Karibian* v. *Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), cert. denied, 512 U.S. 1213 (1994); *Sauers* v. *Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman* v. *Allied Signal, Inc.*, 970 F.2d 178, 185-186 (6th Cir.), cert. denied, 506 U.S. 1041 (1992); *Steele* v. *Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989). Petitioner appears to accept (Pet. 17) that solid wall of precedent as a correct statement of the law.

The district court's finding that petitioner was liable for quid pro quo harassment is consistent with that uniform understanding of the scope of employer liability for such harassment. The district court specifically found that petitioner's area supervisor had engaged in quid pro quo harassment when she fired Papa after he refused to submit to her advances, and that petitioner was liable for that harassment because it had delegated authority to its area supervisor to fire Papa. Pet. App. 11a & n.1. The decision in *Faragher* should not affect that distinct basis for imposing liability on petitioner in this case.

Although petitioner's questions presented do not specifically call into question the district court's finding of quid pro quo harassment, petitioner asserts in the body of its petition (Pet. 20-21) that there was no basis for a finding of quid pro quo harassment in this case. According to petitioner (*ibid.*), the district court erred in finding quid pro quo harassment because Carrier never informed Papa that his refusal to submit to her advances would result in a job detriment. In fact, however, the district court specifically found that, when Papa rejected Carrier's advances, Carrier told Papa that she would "get" him. Pet. App.

5a. In any event, a plaintiff can establish a claim of quid pro quo harassment when the rejection of a supervisor's advances results in a job detriment; there is no requirement that the supervisor threaten the employee with a job detriment beforehand. See *Farley* v. *American Cast Iron Pipe Co.*, 115 F.3d 1548, 1552 (11th Cir. 1997); *Henson* v. *City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982). Thus, the district court's findings make out a core case of quid pro quo harassment and provide an independent ground for its judgment awarding backpay. Petitioner's fact-bound challenge to those findings does not warrant review.

b. The district court also found petitioner liable for retaliation against Papa, Pet. App. 12a, and that retaliation finding provides another independent ground for the judgment awarding backpay. Petitioner's questions presented do not challenge the district court's finding of retaliation (see Pet. i), and the body of its petition refers to that finding only in a footnote, which argues that the finding is unsupported by the evidence. See Pet. 21 n.7. Even if it were appropriate to consider an argument not falling within the questions presented, petitioner's fact-bound challenge to the district court's retaliation finding would not warrant review. As the district court found, the short period of time between Carrier's comment that she would "get" Papa for voicing his opposition to her sexual advances and Carrier's firing of Papa "clearly proves a causal connection between the protected activity and the firing." Pet. App. 12a. The district court's finding of retaliation is therefore supported by the evidence and provides another independent ground for the backpay award that should not be affected by the decision in *Faragher*.

c. The petition in this case also should not be held pending the decision in *Faragher* because petitioner waived any claim that the district court used an erroneous legal standard in finding petitioner liable for the creation of a hostile work environment. Petitioner never argued to the Eleventh Circuit panel that the district court applied an incorrect legal standard in finding it liable for the creation of a hostile work environment. Petitioner argued only that the district court clearly erred in finding that Carrier's conduct was sufficiently severe and pervasive to create a hostile working environment. Because petitioner raised only a clear error challenge to the district court's finding, the court of appeals affirmed without an opinion. See Pet. App. 2a (Eleventh Circuit Rule 36-1 permits affirmance without opinion when the judgment of the district court is based on findings of fact that are not clearly erroneous). Petitioner made its employer liability argument in a petition for rehearing en banc. The Eleventh Circuit, however, does not consider questions raised for the first time in a petition for rehearing en banc absent "exceptional circumstances." See *United States* v. *Martinez*, 96 F.3d 473, 475 (1996), cert. denied, 117 S. Ct. 998 (1997). Consistent with that practice, the Eleventh Circuit did not seek a response to the petition, and it denied the petition without addressing the question presented.

This Court has stated that it "will not ordinarily consider" issues "neither raised before nor considered by the Court of Appeals." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Because petitioner did not properly raise below the issue of the correct standard for imposing liability on an employer for a hostile work environment created by a supervisor,

and because the court below did not consider it, that issue is not properly presented here.

Petitioner contends (Pet. 27) that, since it has always denied liability, it is free to make a new argument supporting that denial. Petitioner relies on the principle that "once a federal claim is properly presented, a party can make any new argument in support of the claim." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). That principle, however, is inapplicable here. The relevant claim in this case is that the district court applied the wrong legal standard in finding petitioner liable for the hostile work environment created by its area supervisor, and petitioner has never properly raised that claim before. A general denial of liability does not empower a defendant to raise new issues at every stage of the appellate process.

Petitioner alternatively contends (Pet. 28) that it should be excused for failing to raise the employer liability issue until its en banc petition, because the intervening decision in *Faragher* first brought that issue to light. Pet. 28. In fact, however, the Eleventh Circuit's decision in *Steele*, 867 F.2d at 1316, had indicated that an employer generally could not be liable for an abusive working environment created by a supervisor absent actual or constructive knowledge of the harassment. And, in any event, petitioner points to no Eleventh Circuit decision that had foreclosed the issue. Petitioner therefore had no legitimate excuse for failing to raise the issue with the panel.

2. Petitioner also contends (Pet. 22-27) that this Court should grant certiorari to decide whether the district court abused its discretion in awarding injunctive relief in this case. Petitioner, however, did not raise any objection to the district court's injunc-

tion before the Eleventh Circuit panel, and the panel did not address the issue. Petitioner raised the issue of the propriety of the injunctive relief for the first time in its petition for rehearing en banc, and, consistent with its ordinary practice, the court of appeals denied the petition without addressing that issue. Because petitioner did not properly raise the issue of the propriety of the injunctive order below and because the court of appeals did not consider it, that issue is not properly presented here.

Even if the issue were properly presented, review would not be warranted. The principles governing the award of injunctive relief are well established. A district court has "'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (quoting *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)). The district court sought to accomplish those goals. Its order does nothing more than enjoin further harassment, direct the petitioner to post notices of its harassment and retaliation policies, and direct petitioner to train its managers in those policies. Pet. App. 16a-17a.

Petitioner complains (Pet. 22-23) that the relief exceeds what is necessary to remedy the violation in this case. The district court heard evidence, however, that while petitioner had policies against harassment and retaliation, they were not effectively communicated. In particular, the court heard testimony from four employees that they had never seen the policies and from three employees that they had not been trained in them. I Tr. 54-55; II Tr. 169; Stout Dep. 78; Cerniglia Dep. 104, 115; Contois Dep. 67-69. At least

one witness other than Papa testified that he had no idea to whom he should complain if he were subjected to harassment. Cerniglia Dep. 108. Moreover, as a plaintiff in this action, the EEOC had authority to seek relief that would not only redress the discrimination to Papa but that would also "vindicate the public interest in preventing employment discrimination." *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980).

Even if the relief were more extensive than necessary, the issue would not warrant this Court's attention. Requiring an employer to comply with the law, and to effectively communicate its own policies is a limited imposition. And because the scope of relief was not contested in the court of appeals and there is accordingly no decision below addressing the propriety of the relief, the relief affects only the parties to this case and does not raise any issue of general importance.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

C. GREGORY STEWART
*General Counsel*

J. RAY TERRY, JR.
*Deputy General Counsel*

VINCENT J. BLACKWOOD
*Acting Associate General Counsel*

LORRAINE C. DAVIS
*Assistant General Counsel*

JENNIFER S. GOLDSTEIN
*Attorney*
*Equal Employment Opportunity Commission*

NOVEMBER 1997